
APPROVED MINUTES OF MEETING
CALIFORNIA LAW REVISION COMMISSION
DECEMBER 1, 2017
Sacramento

A meeting of the California Law Revision Commission was held in Sacramento on December 1, 2017.

Commission:

Present: Thomas Hallinan, Chairperson
Jane McAllister, Vice-Chairperson
Susan Duncan Lee
Victor King
Crystal Miller-O'Brien

Absent: Diane F. Boyer-Vine, Legislative Counsel
Assembly Member Ed Chau
Senator Richard D. Roth

Staff:

Brian Hebert, Executive Director
Barbara Gaal, Chief Deputy Counsel
Kristin Burford, Staff Counsel
Steve Cohen, Staff Counsel
Karin Bailey, Extern
Damian Caravez, Extern

Other Persons:

Kate Cleary, Consortium for Children
Lawrence Doyle, Conference of California Bar Associations
Paul Dubow, California Dispute Resolution Council
Robert Flack
Kurt Heppler, Department of Consumer Affairs
Lexi Howard, California Judges Association
Ron Kelly
Jeff Kichaven
Aaron Maguire, Board of State and Community Corrections
Steven Piser
Hon. Linda Quinn (ret.), California Judges Association
Ana Sambold
Lisa Swafford, Contra Costa County Superior Court
Saveena Takhar, Consumer Attorneys of California
John S. Warnlof, California Dispute Resolution Council
Cordell Wesselink, Consortium for Children

1 **Meeting Schedule**

2 The Commission considered Memorandum 2017-53, presenting a proposed
3 meeting schedule for 2018. The Commission approved the proposed schedule
4 without change.

5 **Annual Report**

6 The Commission considered Memorandum 2017-54, presenting a draft of the
7 2017-2018 Annual Report. The Commission approved the report, subject to
8 conforming revisions described in the memorandum, for publication and
9 distribution to the Legislature and the Governor.

10 **New Topics and Priorities**

11 The Commission considered Memorandum 2017-55, presenting the status of
12 the Commission's current program of work, the new topics suggestions received
13 in 2017, and discussing work priorities for 2018. The Commission made the
14 following decisions:

- 15 • The Commission will postpone its work on civil discovery and
16 monitor the experience under AB 383 (2017), which authorizes
17 informal discovery conferences, before proceeding with work on
18 this topic.
- 19 • The Commission accepted the staff recommendations made in
20 Memorandum 2017-55, including the 2018 work priorities listed on
21 pages 39-40 of the memorandum.

22 *(Commissioner Lee was not present when these decisions were made.)*

23 **STUDY G-400 — CALIFORNIA PUBLIC RECORDS ACT CLEAN-UP**

24 Unless otherwise specified, all of the statutory references below are to the
25 Government Code.

26 **Revised Tentative Outline**

27 The Commission considered Memorandum 2017-48 and its First and Second
28 Supplements, presenting a staff draft of a revised tentative outline of a proposed
29 recodification of the California Public Records Act ("CPRA"). The Commission
30 approved that outline subject to the following decisions:

1 *Heading of Proposed Chapter 3 of Part 5*

2 The heading of Chapter 3 of Part 5 of the proposed recodification should be
3 “Chapter 3. Environmental Protection, Building Standards, and Safety
4 Requirements.”

5 *Heading of Proposed Chapter 10 of Part 5*

6 The heading of Chapter 10 of Part 5 of the proposed recodification should be
7 “Chapter 10. Personal Information and Customer Records.”

8 *Recodification of Section 6255 (Catch-all Exemption)*

9 The Commission approved the approach to recodification of Section 6255 that
10 is suggested at pages 4-5 of Memorandum 2017-48.

11 *Provisions Governing Retention of Public Records*

12 The Commission reaffirmed that the proposed recodification should not
13 incorporate record retention provisions now located outside the CPRA. The
14 Commission decided not to request authority from the Legislature to conduct a
15 separate study on relocating such record retention provisions.

16 *Incorporation of 2017 Legislation*

17 The substance of newly-enacted Section 6254.4.5 should be placed in
18 “Chapter 1. Crimes, Weapons, and Law Enforcement” of Part 5 of the proposed
19 recodification.

20 The version of Section 6253.2 that was repealed in 2017 should be deleted
21 from the outline. (*Commissioner King was not present for this decision.*)

22 **Part 1. General Provisions**

23 The Commission considered Memorandum 2017-49, presenting a draft of
24 “Part 1. General Provisions” of the proposed recodification. The Commission
25 made the following decisions relating to that draft:

26 *Section Numbering in the Proposed Recodification*

27 A 3-decimal-place numbering system should be used in the proposed
28 recodification.

29 *Comment to Proposed Section 7920.000*

30 For purposes of a tentative recommendation, the Comment to proposed
31 Section 7920.000 is satisfactory as drafted.

1 *Recodification of Limited Application Definitions*

2 As the staff prepares the proposed recodification, it should flag each limited
3 application definition in the material being recodified, and discuss whether to
4 place that definition in proposed “Chapter 2. Definitions” or keep it in close
5 proximity to the substantive material to which it pertains. The Commission will
6 determine the appropriate placement of each limited application definition on a
7 case-by-case basis.

8 *Cross-Reference in Section 6252(a)*

9 For purposes of a tentative recommendation, proposed Section 7920.505
10 (continuing Section 6252(a)) and the accompanying Comment are satisfactory as
11 drafted. The tentative recommendation should include a Note immediately after
12 proposed Section 7920.505, which solicits comment on the proper treatment of
13 Section 6252(a)’s cross-reference to “subdivisions (c) *and* (d) of Section 54952”
14 (emphasis added).

15 The tentative recommendation should also include a list of “Corrected Cross-
16 References.” The foregoing cross-reference should be on that list.

17 *Cross-Reference in Section 6254.24(b)*

18 For purposes of a tentative recommendation, proposed Section 7920.530(b)
19 (continuing Section 6254.24(b)) and the accompanying Comment are satisfactory
20 as drafted. The tentative recommendation should include a Note immediately
21 after proposed Section 7920.530, which solicits comment on the proper treatment
22 of Section 6254.24(b)’s cross-reference to “Sections 1808.2 *and* 1808.6 of the
23 Vehicle Code” (emphasis added). That cross-reference should be on the list of
24 “Corrected Cross-References” in the tentative recommendation.

25 *Apparent Error in Section 6254.24(g)*

26 For purposes of a tentative recommendation, proposed Section 7920.530(g)
27 (continuing Section 6254.24(g)) and the accompanying Comment are satisfactory
28 as drafted. The tentative recommendation should include a Note immediately
29 after proposed Section 7920.530, which solicits comment on the proper way to
30 recodify Section 6254.24(g).

31 (*Commissioner Lee was not present for any of the above decisions relating to this*
32 *study.*)

1 **Part 2. Disclosure and Exemptions Generally**

2 The Commission considered Memorandum 2017-60, presenting a draft of
3 “Part 2. Disclosure and Exemptions Generally” of the proposed recodification.
4 The Commission made the following decisions relating to that draft:

5 *Proposed Section 7921.310*

6 For purposes of a tentative recommendation, proposed Section 7921.310
7 (continuing Section 6252.7) and the accompanying Comment are satisfactory as
8 drafted. The tentative recommendation should include a list of “Minor Clean-Up
9 Issues for Possible Future Legislative Attention.” The following entry should be
10 on that list:

- 11 • Consider whether to clarify the usage of the term “local agency” in
12 Section 6252.7 and its continuation (proposed Section 7921.310).

13 *Recodification of Section 6254.5*

14 The sentence in Section 6254.5 defining “agency” for purposes of that section
15 should be recodified as proposed Section 7920.300 in “Chapter 2. Definitions,” to
16 read:

17 7920.300. As used in Section 7921.505, “agency” includes a
18 member, agent, officer, or employee of the agency acting within the
19 scope of his or her membership, agency, office, or employment.

20 **Comment.** Section 7920.300 continues the second sentence of
21 former Section 6254.5 without substantive change.

22 For purposes of a tentative recommendation, proposed Section 7921.505
23 (continuing the remainder of Section 6254.5) and the accompanying Comment
24 are satisfactory as drafted.

25 The list of “Minor Clean-Up Issues for Possible Future Legislative Attention”
26 should include the following entries:

- 27 • Consider whether to simplify the description in the first sentence
28 of Section 6254.5 (proposed Section 7921.505(a)) of which
29 exemptions are waived.
- 30 • Consider whether to revise the descriptions in subdivisions (g) and
31 (i) of Section 6254.5 (proposed Section 7921.505(b)(7) & (9)) to
32 make them more readily understandable.

1 **Cross-References**

2 The Commission considered Memorandum 2017-50 and its First Supplement,
3 relating to statutory cross-references in CPRA provisions. The Commission made
4 the following decisions for purposes of a tentative recommendation:

5 *Cross-References in Section 6254(v) and (y)*

6 In the provision(s) that would recodify Section 6254(v) and (y), the staff
7 should insert the word “former” before each of the cross-references that are
8 shaded on pages 5-6 of Memorandum 2017-50.

9 *Cross-References in Section 6254.2(f) and (g)*

10 In the provision(s) that would recodify Section 6254.2(f) and (g), the cross-
11 references to the federal Insecticide, Fungicide, and Rodenticide Act should
12 include a parallel citation to the United States Code.

13 *Cross-Reference in Section 6254.4*

14 The provision(s) that would recodify Section 6254.4 should cross-refer to the
15 “federal Help America Vote Act of 2002 (52 U.S.C. Sec. 20901 et seq.).”

16 *Cross-Reference in Section 6254.24(g)*

17 Like Section 6254.24(g), the provision that would recodify that section should
18 refer to “a probation officer as defined in Section 830.5 of the Penal Code.” The
19 tentative recommendation should include a Note immediately after the proposed
20 recodification, which would solicit comment on whether to revise the phrase “a
21 probation officer as defined in Section 830.5 of the Penal Code” for the reasons
22 discussed on pages 8-10 of Memorandum 2017-50.

23 *Cross-References in Section 6254.25(e)*

24 The provision(s) that would recodify Section 6254.25 should incorporate the
25 revisions shown on pages 14-15 of Memorandum 2017-50. The tentative
26 recommendation should include a Note after the provision(s), which solicits
27 public comment on those revisions.

28 *Recodification of Section 6254.28*

29 The provision that would recodify Section 6254.28 should use the same terms
30 as in that section (i.e., “official record” and “public record”). The tentative
31 recommendation should include a Note after that provision, which solicits public
32 comment on (1) whether to replace the term “official record” with “official filing”

1 and (2) whether to replace the term “public record” with “public filing,” for the
2 reasons discussed at pages 16-17 of Memorandum 2017-50.

3 *(Commissioner Hallinan was not present for this decision.)*

4 STUDY K-402 — RELATIONSHIP BETWEEN MEDIATION CONFIDENTIALITY AND
5 ATTORNEY MALPRACTICE AND OTHER MISCONDUCT

6 The Commission considered Memorandum 2017-61, which (1) analyzes
7 comments on specific aspects of the tentative recommendation and (2) explores
8 whether the proposed new exception to mediation confidentiality should apply
9 only in a State Bar disciplinary proceeding. The Commission also considered
10 Memorandum 2017-62 and its First and Second Supplements, presenting new
11 comments on this study. In addition, the Commission considered the material
12 that is attached to the Third Supplement to Memorandum 2017-62.

13 The Commission made the decisions described below. All page references
14 pertain to Memorandum 2017-61.

15 **Use of the Phrase “Professional Requirement” (pp. 7-9)**

16 Proposed Evidence Code Section 1120.5(a)(1) should be revised to replace
17 “professional requirement” with “professional obligation,” as follows:

18 1120.5. (a) A communication or a writing that is made or
19 prepared for the purpose of, or in the course of, or pursuant to, a
20 mediation or a mediation consultation, is not made inadmissible, or
21 protected from disclosure, by provisions of this chapter if all of the
22 following requirements are satisfied:

23 (1) The evidence is relevant to prove or disprove an allegation
24 that a lawyer breached a professional requirement obligation when
25 representing a client in the context of a mediation or a mediation
26 consultation.

27

28 **Application in a State Bar Disciplinary Proceeding Only (pp. 10-28)**

29 Commissioner King moved that the proposed new exception apply only in a
30 State Bar disciplinary proceeding. His motion failed for lack of a second.

31 Commissioner Lee moved to keep the approach used in the tentative
32 recommendation — i.e., the proposed new exception would apply in the
33 following types of cases:

34 (A) A disciplinary proceeding against the lawyer under the
35 State Bar Act, Chapter 4 (commencing with Section 6000) of the

1 Business and Professions Code, or a rule or regulation promulgated
2 pursuant to the State Bar Act.

3 (B) A cause of action for damages against the lawyer based
4 upon alleged malpractice.

5 (C) A dispute between the lawyer and client concerning fees,
6 costs, or both, including, but not limited to, a proceeding under
7 Article 13 (commencing with Section 6200) of Chapter 4 of the
8 Business and Professions Code.

9 The Commission passed this motion. (*Commissioner King voted against this*
10 *decision.*)

11 **Claim Against an Attorney for Fraud or Breach of Fiduciary Duty (pp. 28-29)**

12 The Commission decided not to expressly refer to a claim against an attorney
13 for fraud or breach of fiduciary duty in proposed Section 1120.5(a)(2)(B).

14 **Fee Disputes (pp. 29-30)**

15 The Commission decided not to make any revisions of proposed Section
16 1120.5(a)(2)(C). (*Commissioner King voted against this decision.*)

17 The Commission later discussed how proposed Section 1120.5's notice
18 requirement should apply to a fee dispute (see p. 52). During that discussion,
19 Commissioner King moved to make proposed Section 1120.5 inapplicable to a fee
20 dispute. His motion died for lack of a second.

21 **Enforcement of a Mediated Settlement Agreement (pp. 30-33)**

22 The Commission decided that proposed Section 1120.5 already makes
23 sufficiently clear that the exception would only apply in the types of proceedings
24 enumerated in it. Additional language on this point is unnecessary and could be
25 detrimental.

26 **Filing a Cross-Complaint for Legal Malpractice When a Party Moves for** 27 **Enforcement of a Mediated Settlement Agreement (pp. 34-35)**

28 The Commission decided that the Comment revisions suggested on page 35
29 are unnecessary; the possibility of severance is generally well-known and
30 obvious here.

31 **Impact of a Successful Legal Malpractice Suit for Mediation Misconduct (pp.** 32 **35-37)**

33 The Commission considered the Consortium for Children's concern relating
34 to collateral estoppel. The Commission decided that the tentative
35 recommendation already addresses that point in a satisfactory manner.

1 **Exceptions to Paragraph (a)(3) (pp. 39-40; see also pp. 21-22, 37-39)**

2 The Commission decided to revise proposed Section 1120.5(a)(3) as follows to
3 make it subject to the same four exceptions as Evidence Code Section 703.5:

4 1120.5. (a) A communication or a writing that is made or
5 prepared for the purpose of, or in the course of, or pursuant to, a
6 mediation or a mediation consultation, is not made inadmissible, or
7 protected from disclosure, by provisions of this chapter if all of the
8 following requirements are satisfied:

9
10 (3) The evidence does not constitute or disclose a writing of the
11 mediator relating to a mediation conducted by the mediator. This
12 paragraph does not apply to a writing that could (i) give rise to
13 civil or criminal contempt, (ii) constitute a crime, (iii) be the subject
14 of investigation by the State Bar or Commission on Judicial
15 Performance, or (iv) give rise to disqualification proceedings under
16 paragraph (1) or (6) of subdivision (a) of Section 170.1 of the Code
17 of Civil Procedure.

18 **Discussion of Paragraph (a)(3) in the Comment (p. 40)**

19 The Comment to proposed Section 1120.5 should include the following
20 discussion of paragraph (a)(3):

21 Under paragraph (3) of subdivision (a), the mediation
22 confidentiality exception created by this section is inapplicable to
23 evidence that constitutes or discloses a writing of a mediator
24 relating to a mediation conducted by the mediator. This
25 requirement complements the mediator competency restrictions
26 stated in subdivision (e) and Section 703.5, and it is subject to the
27 same four exceptions as those provisions.

28 Thus, unless one of the four exceptions applies, a litigant could
29 neither obtain a mediator’s writing directly from the mediator nor
30 circumvent that restriction by obtaining such a writing from
31 another source. Further, a litigant could not learn the content of
32 such a writing through other materials in the custody of another
33 source. For instance, if the *response* to a mediator’s email message
34 reflects the content of that message, the response would not be
35 discoverable under this section unless the portion of it reflecting the
36 content of the mediator’s message could be effectively redacted.
37 Otherwise, the response would impermissibly “disclose a writing
38 of the mediator relating to a mediation conducted by the
39 mediator.”

1 **Definition of a “Writing” (pp. 40-41)**

2 The Commission decided not to cross-refer to Evidence Code Section 250 in
3 the text of proposed Section 1120.5. The reference in the accompanying Comment
4 is sufficient.

5 **Require Mediator Testimony (pp. 41-42)**

6 The Commission decided not to delete or otherwise revise proposed Section
7 1120.5(e), relating to mediator testimony.

8 **Possible Additional Safeguards Relating to Mediator Testimony and**
9 **Mediator Communications (pp. 42-46)**

10 Commissioner King moved to add the following new paragraph to proposed
11 Section 1120.5(a):

12 1120.5. (a) A communication or a writing that is made or
13 prepared for the purpose of, or in the course of, or pursuant to, a
14 mediation or a mediation consultation, is not made inadmissible, or
15 protected from disclosure, by provisions of this chapter if all of the
16 following requirements are satisfied:

17
18 (4) The evidence does not constitute or disclose a mediation
19 communication of any mediation participant other than the client
20 and attorney specified in subdivision (a).

21 The Commission decided not to make such a revision.

22 (*Commissioners King and McAllister voted for this motion.*)

23 The Commission considered whether to expand proposed Section 1120.5(a)(3)
24 as follows to refer to an oral communication of a mediator:

25 1120.5. (a) A communication or a writing that is made or
26 prepared for the purpose of, or in the course of, or pursuant to, a
27 mediation or a mediation consultation, is not made inadmissible, or
28 protected from disclosure, by provisions of this chapter if all of the
29 following requirements are satisfied:

30
31 (3) The evidence does not constitute or disclose a writing or oral
32 communication of the mediator relating to a mediation conducted
33 by the mediator....

34 The Commission decided to make this revision.

35 The Commission also considered whether to make any revisions relating to
36 mediation briefs. It decided not to do so.

1 **Timing of Required Notice (pp. 46-49); Types of Cases in Which Notice is**
2 **Required (p. 52)**

3 The Commission initially decided that early notification of mediation
4 participants who are not involved in a misconduct dispute is preferable to
5 delayed notification, so that those participants can take steps to protect their
6 interests if they deem that necessary.

7 Later, the Commission decided to require notification of the other mediation
8 participants in every type of proceeding in which proposed Section 1120.5 would
9 apply. Having reached that conclusion, the Commission began discussing
10 specifically when to require such notice in each type of proceeding.

11 The Commission first decided that in a State Bar disciplinary proceeding,
12 notification of the other mediation participants should occur when the State Bar
13 prosecutor files a formal complaint, not during the earlier investigation stage.
14 Upon considering how to treat a fee dispute, however, the Commission decided
15 to establish an across-the-board rule that a party may not invoke proposed
16 Section 1120.5 in any proceeding unless that party gives reasonable advance
17 notice to the other mediation participants.

18 **Only Require Notice to a Mediation Participant Whose Identity and Address**
19 **are Reasonably Ascertainable (p. 49)**

20 The Commission reaffirmed that proposed Section 1120.5 should only require
21 notice to a mediation participant whose identity and address are reasonably
22 ascertainable.

23 *(Commissioner McAllister was not present when this decision was made.)*

24 **Expressly Require Notice to the Mediator (pp. 49-50)**

25 The Commission decided that proposed Section 1120.5 should expressly
26 require notice to the mediator, along the lines shown on page 50.

27 **Content of Notice (see generally pp. 50-52)**

28 The Commission decided that the notice required under proposed Section
29 1120.5 should:

- 30 (1) Specify the names of the parties to the dispute over alleged
31 mediation misconduct.
32 (2) Warn other mediation participants that resolving the dispute
33 might involve disclosure of mediation communications or
34 writings.

1 (3) Identify the statutory provision under which mediation
2 communications or writings might be disclosed (proposed Section
3 1120.5(a)(2)(A), (B), or (C)).

4 In addition, the party providing notice must include a copy of the complaint or
5 other initial pleading alleging mediation misconduct.

6 **Reimbursement of Expenses Incurred By a Third Party Participant (pp. 53-54);**
7 **Consent of All Third Party Participants**

8 The Commission decided not to include a reimbursement requirement in the
9 proposed legislation. Existing law is sufficient to address this point.

10 During the reimbursement discussion, Commissioner Miller-O'Brien moved
11 to condition use of the exception on obtaining consent from the other mediation
12 participants. Her motion died for lack of a second.

13 **Contracting Around the Proposed New Exception (pp. 55-56)**

14 The Commission decided to add the following provision to proposed Section
15 1120.5:

16 (h) Any agreement purporting to override this section is null
17 and void.

18 The accompanying Comment should state:

19 To help ensure that attorneys are held accountable for
20 mediation misconduct, subdivision (h) prevents mediation
21 participants from contractually avoiding the impact of this section.

22 *(Commissioner King voted against these decisions.)*

23 **Informing Mediation Participants About the Exception (pp. 56-57)**

24 The Commission considered whether to specify who must inform mediation
25 participants about the exception, when to provide such information, in what
26 manner, and similar details. The Commission decided not to address those
27 matters in its proposed legislation.

28 **Retroactivity (pp. 57-58)**

29 The Commission decided that the approach to retroactivity used in the
30 tentative recommendation is satisfactory. The uncodified provision and
31 accompanying Comment should remain as is.

1 **Arbitration (see generally p. 48)**

2 The Commission decided that proposed Section 1120.5 should apply to a
3 legal malpractice claim that is arbitrated, not just a legal malpractice claim that is
4 tried in court.

5 **Approval of a Final Recommendation (p. 58)**

6 The Commission directed the staff to prepare a new draft of the
7 Commission’s proposal, which implements the revisions described above and
8 any necessary conforming changes. The staff shall provide that draft to the Chair
9 and Vice Chair for review and approval. Subject to such revisions and approval
10 by the Chair and Vice Chair, the Commission approved the proposal as a final
11 recommendation, for printing and submission to the Legislature and the
12 Governor.

13 *(Commissioner King voted against this decision.)*

14 STUDY L-4130 — DISPOSITION OF ESTATE WITHOUT ADMINISTRATION

15 **Interest Rate**

16 The Commission considered Memorandum 2017-57 and its First Supplement,
17 discussing the 10 percent interest rate applied in certain Probate Code provisions
18 that govern the disposition of a decedent’s estate without administration. The
19 interest is charged when a beneficiary who received property outside of
20 administration is required to return the property to the estate, but no longer
21 owns the property at issue.

22 The Commission decided that the following changes should be made to those
23 interest provisions:

- 24 (1) The interest rate should be set at a fixed rate of 7 per cent.
25 (2) Interest should not begin accruing until a beneficiary has been
26 given notice that property must be returned to the estate.
27 (3) The court should be given discretion to reduce or waive the
28 interest if the beneficiary acted reasonably and in good faith,
29 under the circumstances known to the beneficiary

30 **Dollar Limits**

31 The Commission considered Memorandum 2017-58, discussing the dollar
32 amounts that limit the application of certain Probate Code provisions that govern
33 the disposition of a decedent’s estate without administration.

